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No. 88-1282

In The

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LICENSED BEVERAGE WHOLESALERS OF TENNESSEE

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QUESTION PRESENTED

On March 28, 1989, this Court will hear argument addressed to the constitutionality of the Connecticut beer price affirmation scheme.[1] Tenn. Code Ann. § 57-3-202(e), which provides that wine and distilled spirits cannot be sold in Tennessee unless the supplier affirms that the price in Tennessee is no higher than that charged in other states, constitutes little more than a statutory policy statement. Tennessee does not require price posting; that the affirmed price remain in effect for any fixed time; or prior notice, or regulatory approval of price changes. Tennessee simply insists that prices in Tennessee be no higher than those offered in other states. As such, unlike the Connecticut law, Tennessee's statute does not conflict with the regulatory schemes in other states, subjecting suppliers to inconsistent regulations.

Did the Sixth Circuit correctly conclude that Tennessee's affirmation statute does not violate the Commerce Clause because it neither discriminates against interstate commerce nor subjects Brown-Forman to inconsistent regulations?

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[1] *The Beer Institute v. Healy*, 849 F.2d 757 (2d Cir. 1988), *prob. juris. noted*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (Nos. 88-449 and 88-513) (*"Healy II"*).

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BRIEF IN OPPOSITION OF RESPONDENT LICENSED BEVERAGE WHOLESALERS OF TENNESSEE

The respondent, Licensed Beverage Wholesalers of Tennessee,[2] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 860 F.2d 1354.

[2] The Licensed Beverage Wholesalers of Tennessee ("LBWT") is a trade association that has no parent companies, subsidiaries or affiliates. (Sup.Ct.R. 28.1).

The respondent does not dispute petitioner's description of the Parties; Opinions Below; Jurisdiction; or the Constitutional Provisions and Statute.

STATEMENT OF THE CASE

Petitioner ("Brown-Forman"), a Tennessee corporation with annual gross revenues in excess of one billion dollars (Rec. 6, 153),[3] sells distilled spirits and wines in interstate commerce to control states[4] and to independent wholesalers in more than thirty states, including Tennessee.[5] In the control states, Brown-Forman has entered into contracts that, in effect, establish a price for Brown-Forman products nationwide for periods up to ninety days. These contracts further constrain petitioner's ability to make price adjustments indirectly by defining "price" to include all allowances and rebates paid in any state. (Rec. 116-17, 132).

In 1975, Tenn. Code Ann. § 57-3-202(e) was enacted, requiring suppliers, as a condition of doing business in Tennessee, to affirm that the price of wine and distilled

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[3] "Rec. ___" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

[4] The "control" or "monopoly" states themselves conduct the wholesale and/or retail distribution of wine and spirits. These states are immune from Commerce Clause restraints as market participants. *See, e.g., White v. Massachusetts Council of Construction Employers*, 406 U.S. 204, 206-07, 214-15 (1983).

[5] The wholesalers are extremely small compared to major suppliers, like Brown-Forman. (Rec. 236-37). While wholesalers have input in marketing decisions, most pricing and marketing strategies are dictated by the suppliers. (Rec. 239).

spirits to Tennessee wholesalers is no higher than the price offered to wholesalers in other states. § 57-3-202(e)(1). This statute does not require price posting; prior notice, or regulatory approval of price changes; or that the affirmed price be maintained for a certain fixed time. "Price" is defined to include FOB price, and does not include price differentials based on transportation costs; containers; costs not directly attributable to the quality and proof of the product; and quantity discounts. § 57-3-202(e)(3). When enacted, the only effect of the affirmation statute in Tennessee was to reduce prices on some brands. (Rec. 239-40).

Following this Court's decision in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[6] petitioner filed a number of actions challenging affirmation statutes.[7] In Tennessee, Brown-Forman sought a declaratory judgment that Tenn. Code Ann. § 57-3-202(e) was violative of the Commerce Clause. Unlike the events giving rise to the decision in *Brown-Forman*,[8] this action was not precipitated by threatened administrative action or alleged conflict between state regulations. Rather, petitioner simply withdrew its affirmation claiming that the *Brown-Forman* decision rendered all affirmation statutes unconstitutional to the extent that such statutes skew the forces of supply and demand across the country.

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[6] 476 U.S. 573, 106 S.Ct. 2080 (1986).

[7] *See* Petition for Writ of Certiorari at 21 n. 10, 22 n. 11 (citing cases).

[8] 106 S.Ct. at 2083-84.

While petitioner's sole claim was that Tennessee's statute distorts market forces, at trial, Brown-Forman admitted that its contracts with the control states were much more burdensome than Tennessee's affirmation statute and that those contracts, unlike the Tennessee statute, effectively established a nationwide price for up to ninety days. (Rec. 116-17, 132). The only evidence offered by Brown-Forman in support of its challenge showed that there are regional variations in the demand for its products. Given these regional variations, Brown-Forman argued that it could not make price reductions to increase demand in one part of the country without making corresponding reductions in Tennessee. Conversely, Brown-Forman argued that it could not increase prices in Tennessee to maximize profits without making corresponding price increases around the country.

Petitioner's challenge to the findings of the Sixth Circuit on the alleged extraterritorial impact of the Tennessee statute is surprising since Brown-Forman chose not to introduce economic data in its possession that was directly relevant to this claim. This information was compiled by Brown-Forman in connection with the promotional allowance paid by Brown-Forman to the wholesalers that distribute its products.[9]

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[9] In *Brown-Forman*, 106 S.Ct. at 2083 & n. 2, the promotional allowance used both in New York and in other states was deemed by the New York Liquor Authority to violate its affirmation law. While no such issue is raised in Tennessee, it is noteworthy that this Court observed that these amounts were to be used for "advertising" and that the amount of the allowance "is not tied to the quantity either of the wholesaler's advertising or its purchases of appellant's product." *Id.*

The promotional allowance paid by Brown-Forman to its wholesalers is determined in annual meetings between Brown-Forman and each wholesaler. (Rec. 245-46). In those meetings, past sales records are reviewed, along with market goals and competitors' prices on a brand-by-brand basis. (Rec. 246-53). The parties also discuss the ways each brand is to be promoted during the following year, including price reductions. (Rec. 261-64). The sum of the promotional allowance established for each brand equals the lump sum payment to each wholesaler. The wholesalers keep monthly records of the promotional dollars spent on each brand, including amounts used for price reduction. (Rec. 360-62). All of this information is reported to Brown-Forman and, at the end of the year, it is used in setting the price for each brand for the following year. (Rec. 189-90). After the price for each brand is established, the records are destroyed and the process begins again.[10]

Based solely upon the evidence that there are regional variations in the demand for Brown-Forman's products, the district court held that it was clear that the practical effect of the Tennessee affirmation statute was to "control" the prices of Brown-Forman products in other states. (Rec. 322). The Sixth Circuit reversed, finding the evidence for from clear:

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[10] Throughout the early part of the trial, Brown-Forman's Executive Director of Sales and its Senior Attorney and Assistant Secretary testified repeatedly that it was impossible to determine the effectiveness of the promotional allowance in making price adjustments because petitioner kept no records. (Rec. 107-08; 139; 142-43; 169-70; 180-81; 182-83; 191-92; 194; 217).

> The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remains unknown.[11]

Despite Brown-Forman's failure to quantify the alleged market distortions, the Sixth Circuit presumed that the price elasticity of demand varied significantly in different parts of the country.[12] Based on this assumption, the question addressed by the Sixth Circuit was whether the presumed tendency of the Tennessee statute to affect Brown-Forman's pricing policy constituted impermissible *regulation* of commerce in other states.[13]

The Sixth Circuit held that the presumed extraterritorial repercussions of Tennessee's statute were not violative of the Commerce Clause for three reasons. First, in *Brown-Forman* the New York scheme was held violative of the Commerce Clause because the New York regulations conflicted directly with the regulatory schemes in other states, not because of the "tendency of the [New York] statute to discourage pricing changes." Since petitioner did not allege such a conflict between the regulations in Tennessee and those in other states, the Sixth Circuit

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[11] 840 F.2d at 1358.

[12] *Id.*

[13] *Id.* at 1359.

concluded that the mere tendency to affect pricing decisions was not the kind of extraterritorial *regulation* proscribed by this Court.[14]

Second, in *Seagram*,[15] this Court expressly held that a state *"may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country."*[16] The Sixth Circuit concluded that if assuring low prices is a permissible objective, *a fortiori*, Tennessee's statute, aimed solely at this end did not by virtue of this purpose alone impermissibly regulate out-of-state transactions.[17]

Third, the Sixth Circuit noted that, as in *Seagram*, the claims by Brown-Forman that the Tennessee statute adversely affected consumer prices were "largely matters of conjecture."[18] Given petitioner's speculative claims and the fact that, "[o]n its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*," the

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[14] In its petition, Brown-Forman attempts to characterize this Court's earlier decision as being based on notions of consumer protection. 106 S.Ct. at 2085 (state may not insist that consumers in other states surrender competitive advantage). Petitioner is in error for two reasons. First, if, as *Seagram* held, a state may constitutionally seek lower prices, there is an implicit approval of the inevitable extraterritorial effect of such a policy. Second, the *Brown-Forman* decision was based on the regulatory conflict caused by New York law, not the protectionist effect.

[15] *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966).

[16] 860 F.2d at 1360. (Emphasis original).

[17] *Id.*

[18] *Id.* at 1358, 1360.

Sixth Circuit concluded that so long as *Seagram* remained the law, it was bound to follow it.[19]

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit's Decision That Tennessee's Affirmation Statute Neither Discriminates Against Interstate Commerce Nor Subjects Brown-Forman To Conflicting Regulations Is Consistent With The Decisions Of This Court.

Contrary to the argument of petitioner, the Commerce Clause has never been viewed by this Court as a vehicle to evaluate the economic wisdom of state legislation under the guise of assessing the extraterritorial repercussions of the legitimate exercise of state powers.[20] Many of the inherent powers exercised by the states necessarily affect interstate commerce.[21] The Commerce Clause only prohibits states from discriminating against interstate commerce[22] and from regulating transactions beyond their borders.[23]

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[19] *Id.* at 1361.

[20] *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. ___, 107 S.Ct. 1637, 1653 (1987) (Scalia, J., concurring); *cf. Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (due process).

[21] *See CTS Corp.*, 107 S.Ct. at 1650; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

[22] *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-53 (1977).

[23] *See, e.g., Edgar Corp. v. MITE Corp.*, 457 U.S. 624, 642 (1982); *Kassel v. Consolidated Freightways*, 450 U.S. 662, 671 (1981).

When Congress so chooses, it may exempt state action from challenge under the Commerce Clause.[24] This Court has held, however, that the Twenty-first Amendment, unlike acts of Congress committing business regulation to the states, does not completely exempt state liquor regulation from Commerce Clause constraints.[25] While this Court's Twenty-first Amendment decisions are difficult to characterize as a whole, in the area of price affirmation, this Court has accorded the states substantial deference. LBWT submits that in the area of price affirmation, it is indisputable that this Court has resolved the issues raised by petitioner in precisely the same manner as the Sixth Circuit.

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[24] *See Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 174-75 (1985) (Bank Holding Company Act of 1956, § 3(d), as amended, 12 U.S.C. § 1842(d)); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981) (McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*).

[25] *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 726-27 (1987); *California Retail Liquor Dealers Ass'n v. MidCal*, 445 U.S. 97, 109-10 (1980).

This Court's initial decisions under the Twenty-first Amendment accorded the states almost unqualified power. *See, e.g., State Bd. of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 62 (1936). The widely-varied contexts in which this Court's recent decisions have addressed the scope of the power conferred by the Twenty-first Amendment make categorical statements about the scope of the amendment impossible. *See, e.g., 324 Liquor Corp.*, 107 S.Ct. at 730 (O'Connor, J., dissenting) (Twenty-first Amendment virtually a dead letter).

This Court first visited affirmation in *Joseph E. Seagram & Sons, Inc. v. Hostetter*.[26] At that time, New York's affirmation law was retroactive, requiring the supplier to warrant that its price in New York was no higher than the lowest price offered in other states in the preceding month.[27] The statute also required suppliers to post the affirmed price and to maintain that price for a month.[28] Changes in affirmed prices could not be made without prior written administrative approval.[29] "Price" was defined to include all rebates, allowances, free goods and inducements of any kind.[30]

In rejecting Seagram's facial Commerce Clause challenge, this Court held that,

> the mere fact that [the state law] is geared to . . . pricing policies in other states is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.[31]

In holding that the states may constitutionally insist that their wholesalers receive liquor at prices as low as offered in other parts of the country, this Court emphasized that while such a policy could affect market forces,

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[26] 384 U.S. 35 (1966).

[27] *Id.* at 39-40.

[28] *Id.*

[29] *Id.* at 53.

[30] *Id.* at 57.

[31] *Id.* at 43. The Court also held that this goal did not violate the Due Process Clause. *Id.* at 47.

evidence of such an effect had not been presented. Further, this Court observed that even if such evidence had been proffered, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."[32]

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[33] this Court again addressed a challenge to New York's affirmation law.[34] Unlike the facial challenge raised in *Seagram*, however, *Brown-Forman* was precipitated by an administrative action commenced against the supplier because Brown-Forman had used a promotional allowance authorized in other states, allegedly in violation of its New York price affirmation. In holding the New York statute violative of the Commerce Clause, this Court emphasized that New York's regulatory scheme effectively forced Brown-Forman to abandon the promotional allowance in states in which the program was legal or forced other states to modify their regulatory

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[32] *Id.* at 43. *Accord United States Brewers Ass'n v. Healy*, 692 F.2d 275, 283-84 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

[33] 476 U.S. 573, 106 S.Ct. 2080 (1986).

[34] While the New York affirmation scheme had been amended after *Seagram*, it was in most respects the same. The statute required price posting; it required that the posted price be maintained for a period of one month; it required notice and regulatory approval of price changes; and it defined "price" in detail. The only material difference in the two schemes was the period covered by the affirmation.

schemes.[35] This extraterritorial *regulation* not only subjected Brown-Forman to inconsistent obligations, but interfered with the Twenty-first Amendment power of other states.[36]

Petitioner claims that the Sixth Circuit erred in upholding the Tennessee statute because *Brown-Forman* expressly refused to attach constitutional significance to the difference between prospective statutes, like the one before it, and retroactive statutes, as in *Seagram*. From this proposition, petitioner argues that the principles in *Brown-Forman* are not limited to prospective statutes, but apply to all affirmation statutes. One of these principles, according to petitioner, is that *Brown-Forman* struck the New York statute because of its effect on consumers. Thus, argues petitioner, the Sixth Circuit erred by not according the alleged extraterritiorial impact of Tennessee's statute on consumer prices controlling weight.

LBWT disagrees. It is clear, as petitioner states, that the principles announced in *Seagram* and *Brown-Forman* do not turn principally on whether the affirmation statute is prospective or retrospective. As such, LBWT also agrees that both cases address standards to be applied to all affirmation statutes, whether denominated as retroactive, contemporaneous or prospective.

LBWT does not agree, however, that the *Brown-Forman* decision was aimed at consumer injury. The *Brown-Forman* decision was based on the New York statute's subjecting suppliers to inconsistent and conflicting regulatory obligations.

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[35] *Id.* at 2086-87.

[36] *Id.* at 2088.

Petitioner also criticizes the Sixth Circuit for refusing to weigh the alleged extraterritorial impact on consumer prices. Setting aside that the Commerce Clause does not proscribe state legislation simply because effects occur outside the state's borders and that this Court has expressly approved the objective of seeking lower liquor prices, Brown-Forman introduced no evidence to support its claim. In fact, it had compiled information on the issue, but destroyed it. (Rec. 194-95).

This failure to introduce evidence on the effects of affirmation is compounded by Brown-Forman's acknowledgment that its contractual obligations in the control states were substantially more burdensome than the Tennessee law. Thus, Brown-Forman refused to introduce evidence of economic injury in a case in which it admitted that its inability to change prices was caused by contractual obligations in other states. Under such circumstances, the Sixth Circuit's refusal to strike presumptively valid state legislation based on petitioner's unsubstantiated, if not completely hypothetical claims was not error, but responsible decisionmaking.

II.

The Decision Of The Sixth Circuit And The Decision Of The Second Circuit In *Healy II* Are Not Inconsistent.

In *The Beer Institute v. Healy*,[37] the Second Circuit held the Connecticut beer affirmation statute violative of the Commerce Clause because its "purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders."[38] As the Sixth Circuit explained, its decision is not necessarily inconsistent

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[37] 849 F.2d 757.

[38] *Id.* at 759, 760-61.

with *Healy II* because, unlike the Connecticut statute, the Tennessee statute does not present the issue of conflict with regulations in other states. To the contrary, Tennessee's statute "simply requires that a distiller set its Tennessee prices at the lowest level it chooses to set in other states."[39]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[39] 860 F.2d at 1361.